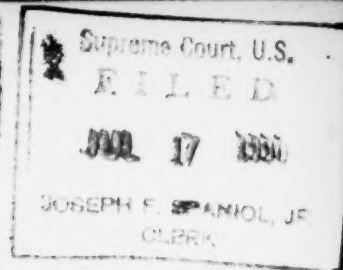


90-263



Case No.: _____

Supreme Court of the United States

October Term 1990

Deloris M. Adams and Grady C. Adams,

Petitioners,

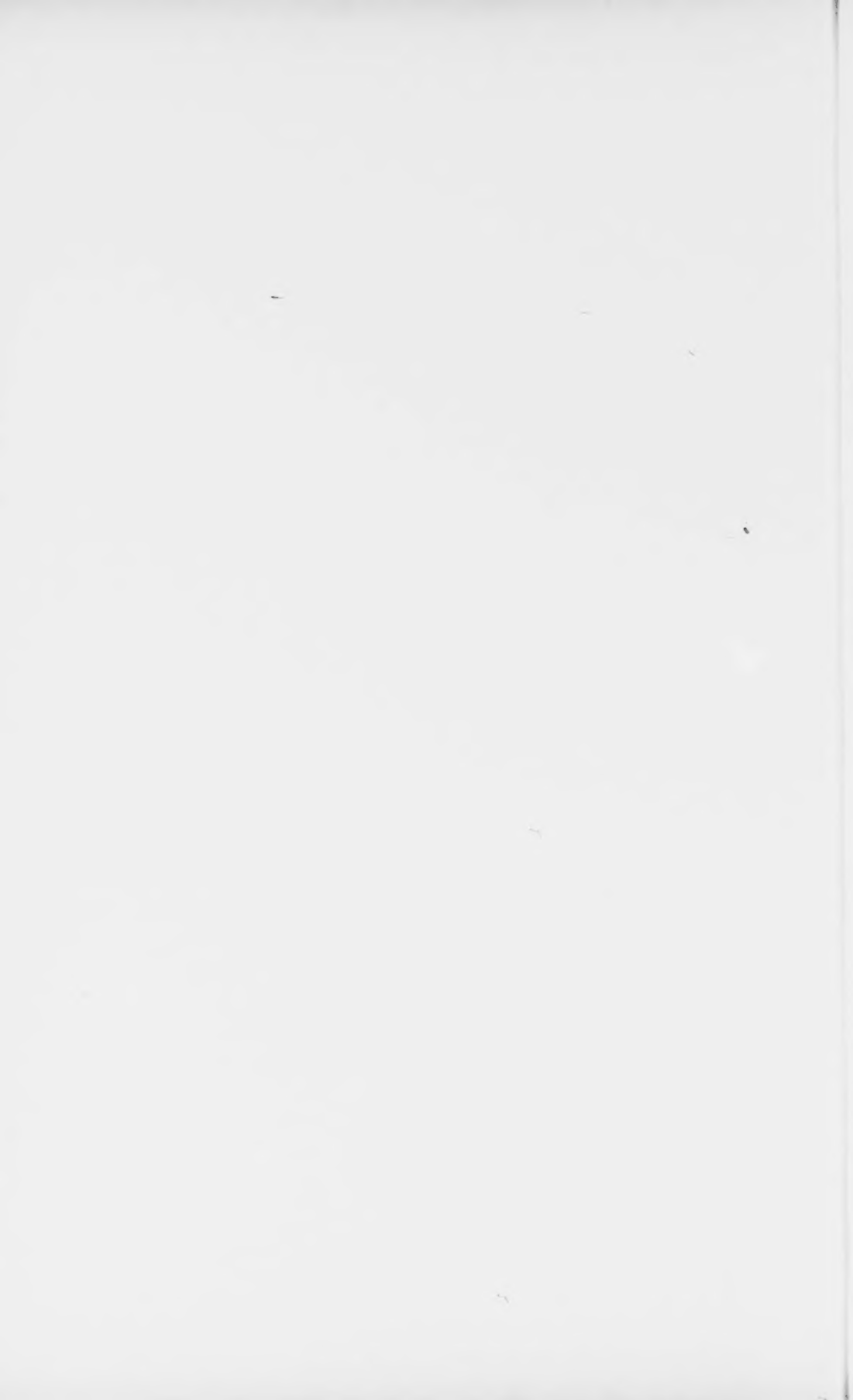
Leisure Dynamics, Inc., and Vista Host,
Inc., a joint venture, d/b/a Holiday
Inn North,

Respondents.

On Writ of Certiorari to the United
States Court of Appeals for
Eleventh Circuit

Petition for Writ of Certiorari

RICHARD B. DAVIS, JR.
Davis & Meadows, P.A.
Counsel of Record for Petitioners
408 W. University Ave., #601
Gainesville, FL 32601
(904) 376-1100



QUESTION PRESENTED FOR REVIEW:

Did the resolving of disputed facts by the trial judge in ruling on the Defendant's Motion for Summary Judgment and a subsequent holding that, as a matter of law, there was no genuine issue as to any material fact, violate this Court's doctrine in Matsushita Electric Industrial Co. vs. Zenith Radio Corporation, 475 U.S. 574 (1976); Anderson vs. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corporation vs. Catrett, 477 U.S. 317 (1986), and thereby deprive Plaintiff of the right of trial by jury as guaranteed by the United States Constitution, Amendment 7.



LIST OF PARTIES TO THE PROCEEDING:

Deloris M. Adams, Petitioner
c/o Davis & Meadows, P.A.
408 W. University Ave., #601
Gainesville, FL 32601

Grady C. Adams, Petitioner
c/o Davis & Meadows, P.A.
408 W. University Ave., #601
Gainesville, FL 32601

Leisure Dynamics, Inc. and
Vista Host, Inc., a joint
venture d/b/a Holiday Inn
North, Respondents
c/o Clark, Partington, Hart,
Larry, Bond, Stackhouse &
Stone, P.A.
P. O. Box 13010
Pensacola, FL 32591-3010

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REPORTS OF LOWER COURT OPINIONS:

PCA 88-30341/SMN

United States District Court for the
Northern District of Florida, Pensacola
Division: Memorandum decision of a United
States Magistrate

No. 89-3842; D.C. Docket No.: 88-30341-
SMN

United States Court of Appeals for the
Eleventh Circuit: Per Curiam: Affirmed



STATEMENT OF GROUNDS FOR JURISDICTION:

The date of the judgment to be reviewed was April 19, 1990. The time of its entry was not stated on said judgment. Pursuant to 28 U.S.C., Section 2101(c), Petitioner has until July 19, 1990, to file Petition for Writ of Certiorari.

This Honorable Court has jurisdiction to review the judgment pursuant to Section 1254 (1), Title 28, United States Code, Judiciary and Judicial Procedure; and Section 2350, Title 28, United States Code, Judiciary and Judicial Procedure.



CONSTITUTIONAL PROVISIONS AND RULES

WHICH THIS CASE INVOLVES:

Amendment VII - Civil Trials, United States Constitution.

Rule 56. Summary Judgment. Federal Rules of Civil Procedure.



STATEMENT OF THE CASE:

Petitioner, DELORIS M. ADAMS, was on a business trip in Pensacola, Florida, on or about March 30, 1986. At approximately 4:00 p.m., on March 30, 1986, Mrs. Adams arrived at the Holiday Inn on Highway 29 North, in Pensacola, Florida. Mrs. Adams entered the premises through the front door of the Inn, and "caught" her foot on a low end table which was directly in the path to the front desk, and fell. Mrs. Adams sustained a fractured right elbow and a sprained right wrist, resulting in significant permanent impairment, lost income, and substantial pain and suffering.

It is undisputed that the property was owned by Respondents, LEISURE DYNAMICS, INC., and VISTA HOST, INC., a joint venture, d/b/a HOLIDAY INN NORTH,

and was operated as a business for the purpose of providing overnight accommodations to the public. It is also undisputed that Mrs. Adams was an invited member of the public, who entered onto the premises for the purpose of renting accommodations. It is additionally undisputed that Mrs. Adams did not see the table before she tripped and fell. No one saw Mrs. Adams fall, but the guest service manager and an employee of the Respondents saw her immediately after she fell and sustained her injuries.

Facts and inferences which were alleged by Petitioners and were supported by testimony and evidence in the record and which should have been drawn in favor of Petitioners in consideration of the Motion for Summary Judgment filed by Respondents, were as follows:

- (a) The table was low; and



(b) The table was situated very close to the front door of the Inn, in the path of the most direct route to the registration desk; and

(c) The table did not have anything placed upon it; and

(d) The table should have had something placed upon it, according to the Regional Manager for the property owners, as per the owners' own policy; and

(e) The Inn lobby was congested; and

(f) That, most often, patrons of the Holiday Inn were not familiar with the layout of the lobby; and

(g) It was Mrs. Adams' first visit to the Inn.

The Defendants moved for summary judgment on the singular ground that the table that caused Mrs. Adams' fall was



open and observable to Mrs. Adams, therefore not creating a "dangerous condition" sufficient to impose any liability on the part of the property owners. The Magistrate at the trial court level granted Defendants' motion for summary judgment based upon her own resolving of disputed facts, and entered judgment in favor of Defendants. The United States Court of Appeals, Eleventh Circuit, per curiam affirmed the Magistrate's memorandum decision on April 19, 1990.

The basis for federal jurisdiction in the court of first instance (United States District Court for the Northern District of Florida) was Section 1332, U.S.C., Diversity of Citizenship and damages in excess of \$10,000.00, exclusive of interest and costs.



ARGUMENT OF REASONS RELIED ON FOR
ALLOWANCE OF WRIT OF CERTIORARI:

Denial of Right to Jury Trial:

The granting of the Appellees' motion for summary judgment by the District Court Magistrate, in this simple negligence trip-and-fall case, was inappropriate as a matter of law since the Magistrate actually weighed the evidence and made a determination of fact, and failed to limit herself to the determination of whether there was a genuine issue for trial, thus violating the rights of the Appellant, as guaranteed under Amendment VII of the United States Constitution, the right of trial by jury.

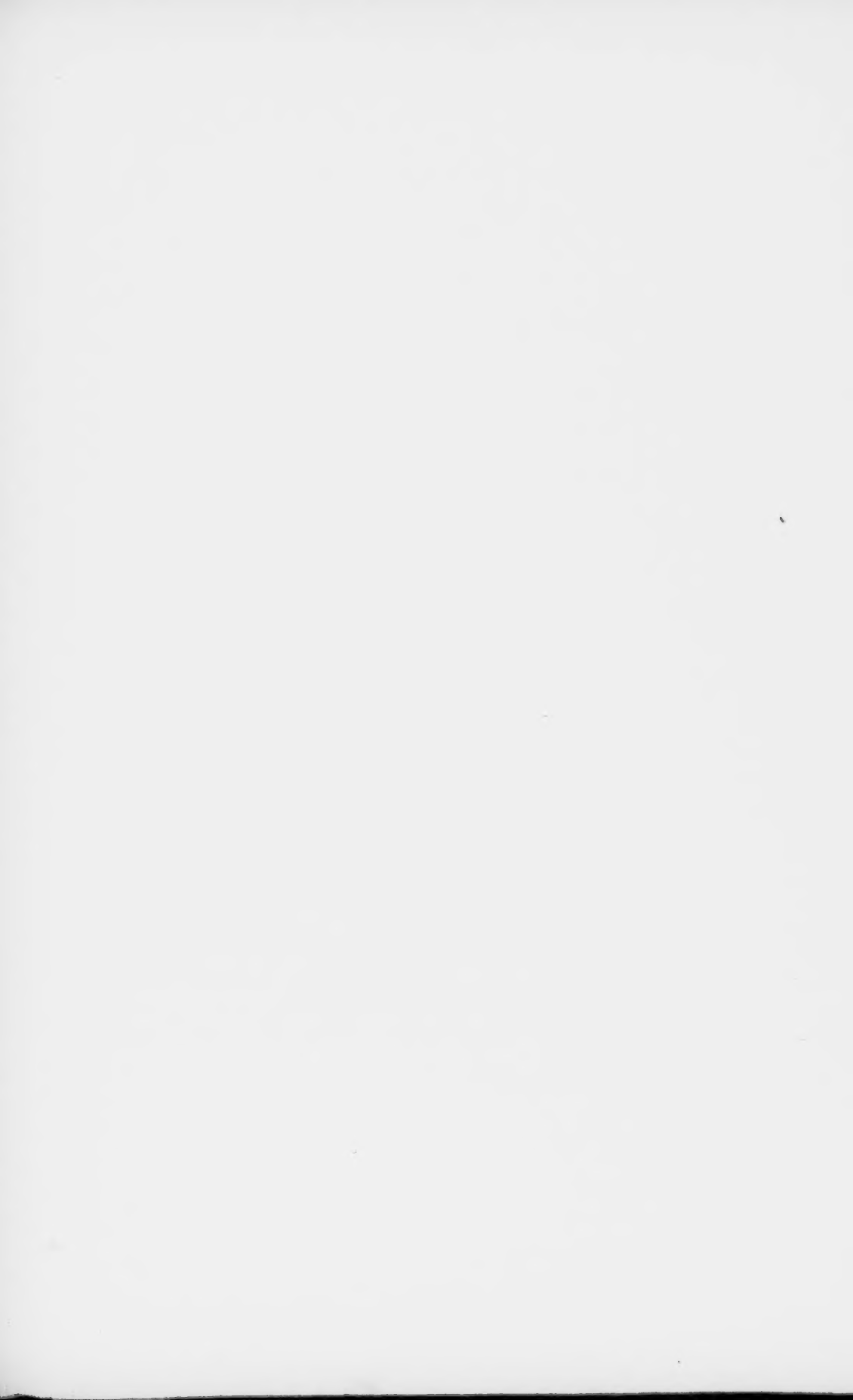
The unresolved issues of fact as stated in the original pleadings, depositions, answers to interrogatories, admissions on file, and other evidence in



the case, demonstrated that there were genuine issues of substantial material fact that could not give rise to the granting of Respondents' motion for summary judgment. Furthermore, the Magistrate failed to draw every possible inference in favor of the party against whom summary judgment was granted. The answers to the obvious and unresolved issues of fact in the case should have been left to the trier of fact.

Florida substantive law governs negligent acts occurring within the State of Florida, and this Florida substantive law states that questions of negligence should be left for juries to decide. Harville v. Anchor - Wate Company, 663 Fed.2d 598 (5th Circuit 1981); Holl v. Talcott, 191 So.2d 40 (Fla. 1966).

The federal courts agree that summary judgments are looked on with



disfavor in negligence actions. Gulf Life Insurance Company v. Folsom, 806 Fed.2d 225 (11 Cir. 1986). In Gulf Life, the 11th Circuit Court of Appeals said, "Only in the rare case where there is an admission of liability, or an indisputable fact situation that clearly establishes liability, should summary judgment be granted." (806 Fed. 2d at 225).

The burden is on the movant defendant (Appellee) to prove that there is no genuine dispute regarding the defendants' negligence, not on the non-moving plaintiff (Appellant) to prove defendants' (Appellees) negligence at this point in the proceeding. Rule 56, Fed.R.Civ.P.; James v. Skinner, 464 So.2d 588 (Fla. 2 DCA 1985).

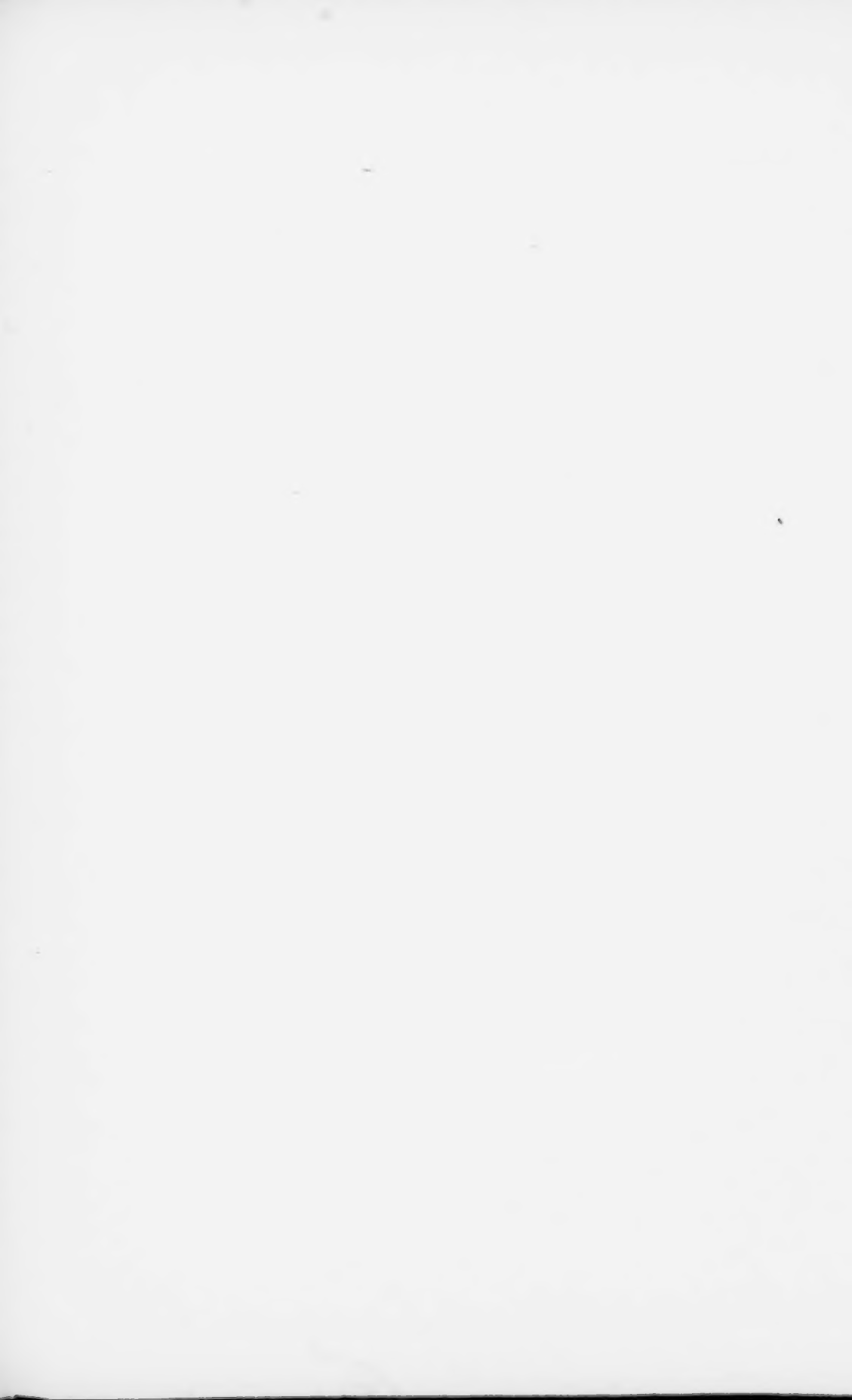
Numerous cases have held that, where the cases are extremely close on the



question of negligence, they should be resolved in favor of a jury trial. Holmes, Bess v. 17545 Collins Avenue, Inc., 98 So.2d 490 (Fla. 1957); Smith v. Reeder, 371 So.2d 718 (3 DCA 1989); Bowes v. Lerner Shops International, Inc., 422 So.2d 1041 (4 DCA 1982).

Supervisory Powers:

The Eleventh Circuit United States Court of Appeals has departed from the accepted and usual course of Rule 56 of the Rules of Civil Procedure, and of judicial proceedings, and has sanctioned such a departure by a lower court (United States District Court, Northern District of Florida), as to call for an exercise of this Court's power of supervision.



Misapplication of the Doctrine of Summary Judgment:

This Honorable Court must look at and consider the lower Courts' misapplication of three Supreme Court cases that were all decided within three months of each other in the Spring of 1986. Matsushita Electric Industrial Co. vs. Zenith Radio Corporation, 475 U.S. 574 (1976); Anderson vs. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corporation vs. Catrett, 477 U.S. 317 (1986). All of these cases dealt with the entry of summary judgments, in three different types of cases. The first of these cases involved an anti-trust suit (Matsushita Electrical Industrial Co., supra.); the second, a libel action (Anderson, supra.); and the third, a wrongful death action dealing with



exposure to asbestos products (Celotex Corporation, supra.). The espoused standards for summary judgment under Federal Rule 56 remains the same and is reiterated in these cases. However, the Supreme Court resolved each case on its unique facts while it reiterated the proper application of summary judgment.

In the Matsushita Electrical Industrial Co. case, the Supreme Court considered the appropriateness of the appellee's motion for summary judgment in an antitrust conspiracy case. The Supreme Court remanded the case to see if there was other evidence sufficiently unambiguous to permit a trier of fact to find that there was, in fact, a conspiracy. Justice Powell clearly pointed out on page 576 of the decision that the Court was considering the standard that District Courts must apply



when deciding whether to grant summary judgment in an anti-trust conspiracy case. If the record taken as a whole could lead a rational trier of fact to find for the non-moving party, then there is a genuine issue for trial and summary judgment should not be granted. Matsushita Electrical Industrial Co. at page 574.

There are more than sufficient facts from which a jury may find Holiday Inn negligent, such as the fact that Mrs. Adams was a first-visit invitee to the Inn, and that the low table that was situated very close to the front door of the Inn, in the path of the most direct route to the registration desk, should have had something placed on it, as per the Inn's own policy.

Furthermore, on summary judgment, inferences are to be drawn from the

underlying facts and be viewed in the light most favorable to the party opposing the motion. Matsushita Electrical Industrial Co. at page 574. The Court below paid lip service to this doctrine, but ignored it and instead chose to believe some testimony, and not other testimony. For instance, on Page 7 of her Decision, the Magistrate finds that "the table..should have been obvious to the plaintiff when she entered the hotel lobby.." This statement is based on only some of the facts elicited by the exhibits offered in support and in opposition to the motion for summary judgment. The Magistrate "found" that the placement of the table in a carpeted seating area of a hotel lobby was obvious and commonplace, thus "choosing" which set of facts and what evidence to "believe" from the exhibits submitted in



support of and in opposition to the motion for summary judgment.

She further found that it is "common knowledge that a hotel lobby will contain furniture." This statement puts a burden on the plaintiff that does not need to be met or have anything to do with a motion for summary judgment. On Page 5 of the Magistrate's Memorandum Decision, she summarizes what the exhibits that were offered in support and in opposition to the motion for summary judgment exhibited to her, when in fact, the "facts" that are stated in this portion of her decision are mostly disputed between the plaintiffs and defendants. The Magistrate further found, on Page 6 of her Decision, that she felt that the plaintiffs' arguments were a "mere restatement of conclusory assertions," even though Plaintiff testified to the



same in her deposition.

In Anderson, supra., this Court again held that summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson at page 242. The trial judge's function is not herself to weigh the evidence and determine the truth of the matter, but to determine whether there is genuine issue at trial (Anderson at page 243). Although the court upheld the summary judgment in the Anderson libel case, that approval was based upon a heavier burden of proof, i.e., clear and convincing, not merely by a preponderance of the evidence, which is the standard to which the evidence must rise to establish disputed facts in a hearing on a motion for summary judgment in a negligence



case.

The final summary judgment case heard by this Court, Celotex Corporation, supra., dealt with the death of one who had been exposed to asbestos, under a products liability theory. While again enunciating the standard for the granting or denying a motion for summary judgment, the court upheld the lower court's granting of a summary judgment because in that case there was no evidence that the deceased's exposure to asbestos was causally connected to products manufactured by the defendant. In the case at bar, there is a great deal of evidence to support the Adams' contention that Holiday Inn was negligent in the design and placement of their furniture.

In all three Supreme Court cases, it was reiterated that judges are not to decide disputed issues of fact and if



there are any genuine material facts in the record, along with the requirement to view any inferences in a light most favorable to the non-moving party, summary judgement will not lie.

Although most courts simply have stated that Rule 56 of the Federal Rules of Civil Procedure was not intended to deprive a party of a jury trial (Poller v. Columbia Broadcasting Systems, Inc., 82 S.Ct. 486 (1962); Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620 (1944)), in order to assure that this right is protected, the federal courts take great care not to deny the non-moving party a full trial once it is shown that a genuine issue of fact exists, or that the judgment ultimately might depend on the credibility of witnesses, since courts should not attempt to try fact issues when ruling on



motions for summary judgment. Cameron v. Vancouver Plywood Corp., 266 Fed.2d 535 (C.A. 9th 1959); Griffeth v. Utah Power and Light Company, 226 Fed.2d 661 (C.A. 9th 1955); Elliott v. Elliott, 49 F.R.D. 283 (D.C.N.Y. 1970); Cales v. Chesapeake and Ohio Railroad, 46 F.R.D. 36 (D.C.Va. 1969); Hoffman v. Babbitt Brothers Trading Company, 203 Fed.2d 636 (C.A. 9th 1953); Briggs v. Kerrigan, 431 Fed.2d 937 (C.A. 1st 1970).



Conclusion

This Honorable Court should grant the Petitioners' writ of certiorari because of the unacceptable departure from the usual course of judicial proceedings taken by the 11th Circuit United States Court of Appeals and by the United States District Court, Northern District of Florida, which has denied the Plaintiffs their constitutional right to a trial by jury and their common law right to their day in court.

The lower courts' open and obvious misapplication of this Court's doctrine Matsushita Electric Industrial Co. vs. Zenith Radio Corporation, 475 U.S. 574 (1976); Anderson vs. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corporation vs. Catrett, 477 U.S. 317 (1986) to this summary judgment motion is but one of many lower court opinions

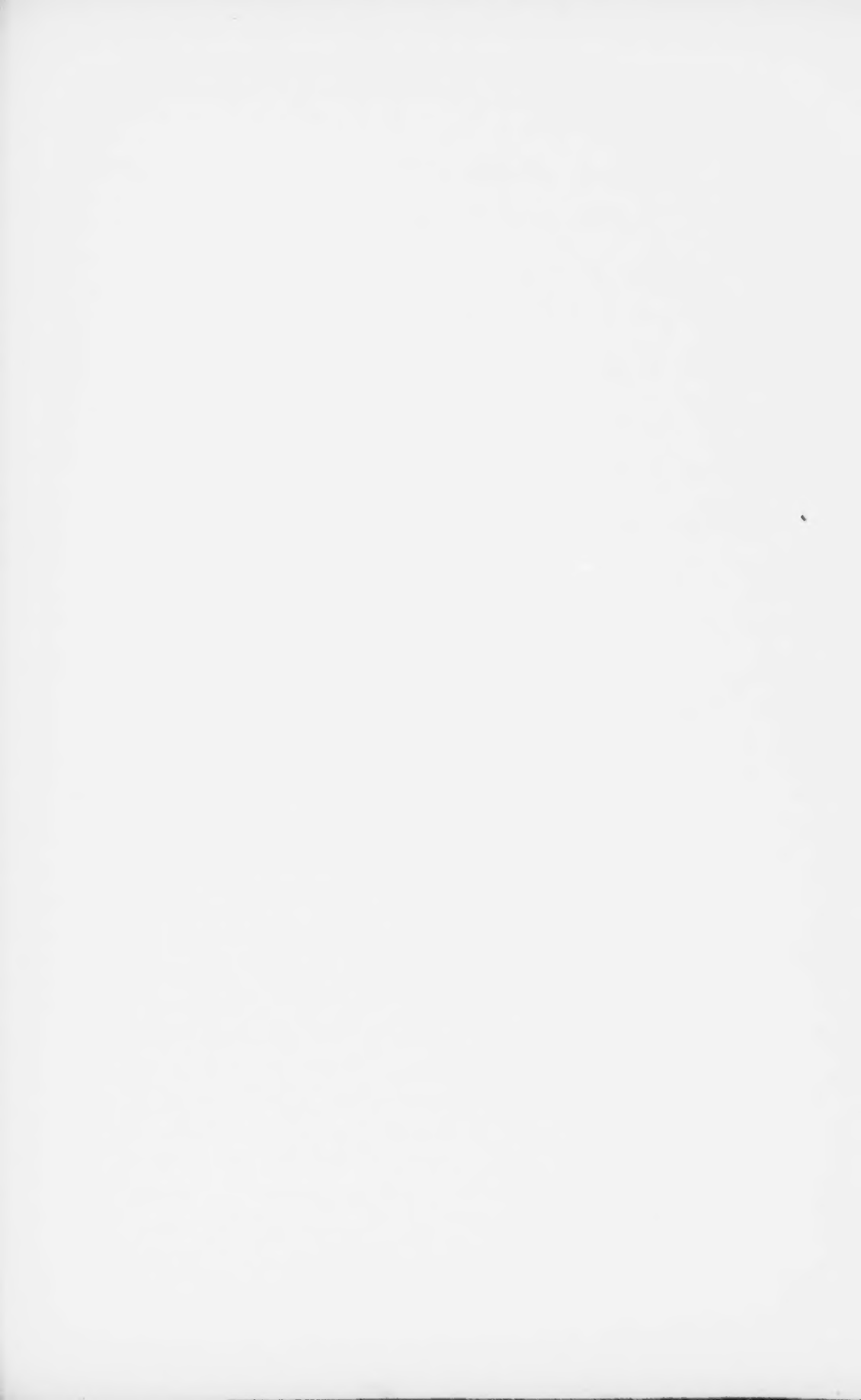
resulting in wholesale denial of trials in disputed matters by trial courts which are rushing to final judgment without heeding this Country's and this Court's long-standing doctrine of allowing juries, not magistrates, to resolve disputed issues of fact.



APPENDIX

Mandate of the United States Court of Appeals for the Eleventh Circuit, Case No. 89-3842, D.C. Docket No. 88-30341-SMN, dated May 15, 1990.

Memorandum Decision in Adams v. Leisure Dynamics, Inc., Case No. 88-30341-SMN, United States District Court for the Northern District of Florida, Pensacola Division, dated September 1, 1989.



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3842
Non-Argument Calendar

D.C. Docket No. 88-30341-SMN

DELORIS M. ADAMS, and
GRADY C. ADAMS, her husband,

Plaintiffs-Appellants,

versus

LEISURE DYNAMICS, INC., and
VISTA HOST, INC., a joint venture
d/b/a/ HOLIDAY INN NORTH,

Defendants-Appellees.

Appeal from the United States District
Court for the Northern District
of Florida

(April 19, 1990)

Before TJOFLAT, Chief Judge, FAY and
JOHNSON, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir.
Rule 36-1.

"Costs taxed against plaintiffs-
appellants."

Judgment Entered: April 19, 1990



For the Court: Miguel J. Cortez,
Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: MAY 15 1990

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DELORIS M. ADAMS and
GRADY C. ADAMS, her
husband,

Plaintiffs,

vs.

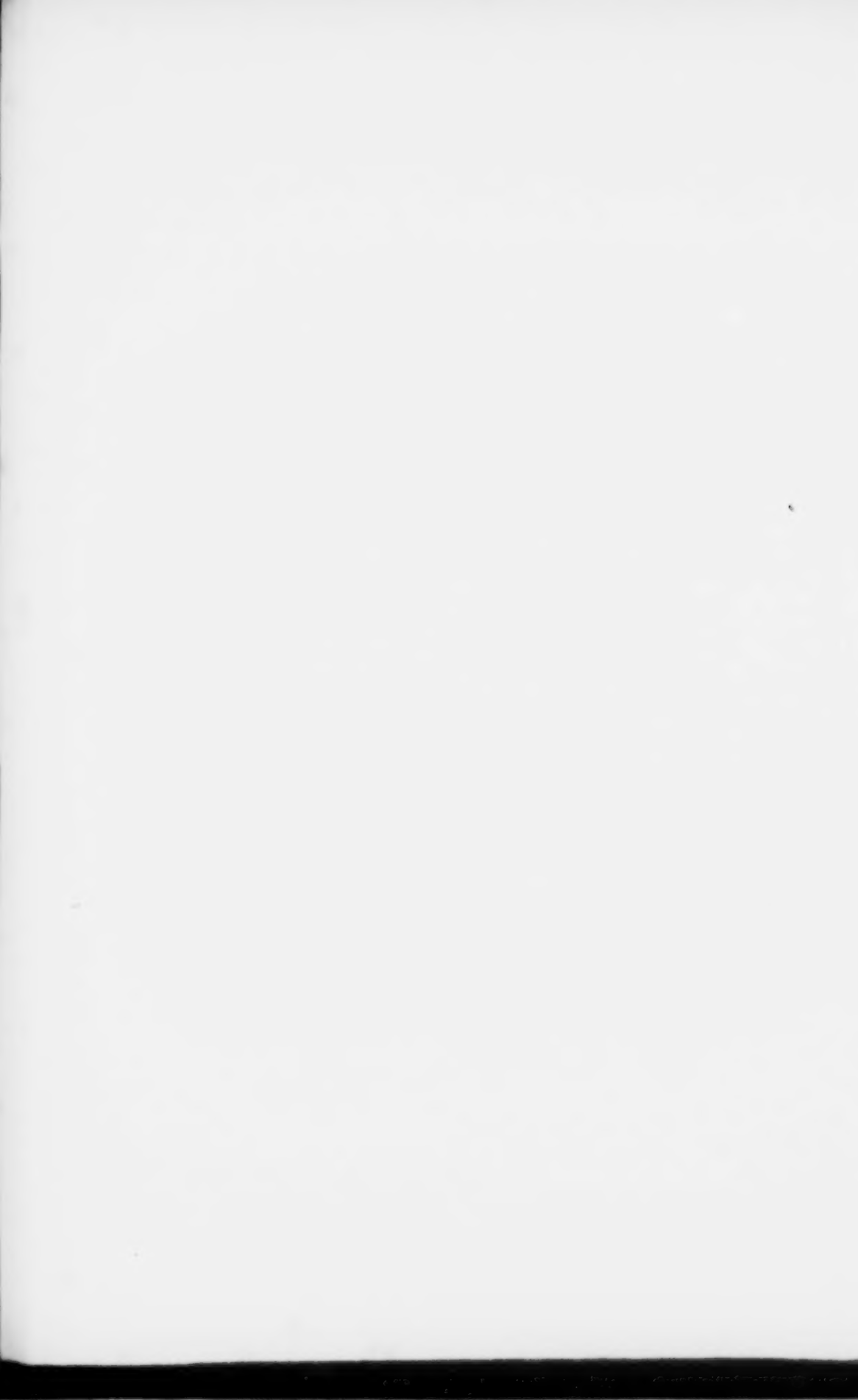
PCA 88-30341/SMN

LEISURE DYNAMICS, INC.
and VISTA HOST, INC.,
a joint venture d/b/a
HOLIDAY INN NORTH,

Defendants.

MEMORANDUM DECISION

This matter is before the court on the defendant's motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, and the plaintiffs' Rule 37 motion to compel discovery. Plaintiffs brought this personal injury - diversity action against the defendant corporations which jointly operate a hotel known as Holiday Inn North located in Pensacola, Florida.



The action arises out of an accident wherein plaintiff Deloris Adams sustained injuries when she presumably tripped over or on a table that was in the lobby of the hotel. Plaintiffs contend the defendants breached their duty to correct or warn plaintiff of a dangerous condition on defendants' property, that is, the low table allegedly obscured from view.

I. DUTY OF CARE

It is well established that in a diversity action to recover damages sustained due to an allegedly negligent act or omission occurring within the state of Florida, Florida negligence laws govern. See, e.g., Harville v. Anchor-Wate Co., 663 F.2d 598 (5th Cir. 1981). Florida courts have adopted the duties of care owed to business invitees as recited within the Restatement (Second) of Torts, which in ss. 343(A)(1965) provides:



A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Casby v. Flint, 520 So.2d 281 (Fla. 1988). In Florida, a property owner has two recognized duties toward invitees: first, to keep his property in reasonably safe condition and to protect an invitee from dangers of which he is or should be aware, and second, to warn an invitee of concealed dangers which are or should be known to the owner or occupier but which are unknown to the invitee and cannot be discovered by him through the exercise of due care. Maldonado v. Jack M. Berry Grove Corp., 351 So.2d 967, 970 (Fla. 1977); Levy v. Home Depot, Inc., 518 So. 2d 941 (Fla. 3d D.C.A. 1987). An owner of property has no duty to warn of an obvious condition which is not itself



dangerous. Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983); Prager v. Marks Bros. Co., 483 So.2d 881 (Fla. 3d. D.C.A. 1986); Pensacola Restaurant Supply v. Davison, 266 So.2d 682 (Fla. 1st D.C.A. 1972).

Plaintiffs argue that the defendants did not maintain the hotel lobby in a reasonably safe condition and did not protect from or warn plaintiff, an invitee who was a first-time visitor to the hotel and not familiar with the layout of the hotel's lobby, of the dangerous placement of a low table in close proximity to, and between, the front door of the lobby and main desk. Plaintiffs contend the table constituted a danger of which the defendant should have been aware. Plaintiffs claim the table was not open and obvious, and suggest instead that it was obstructed and obscured and placed in a manner that

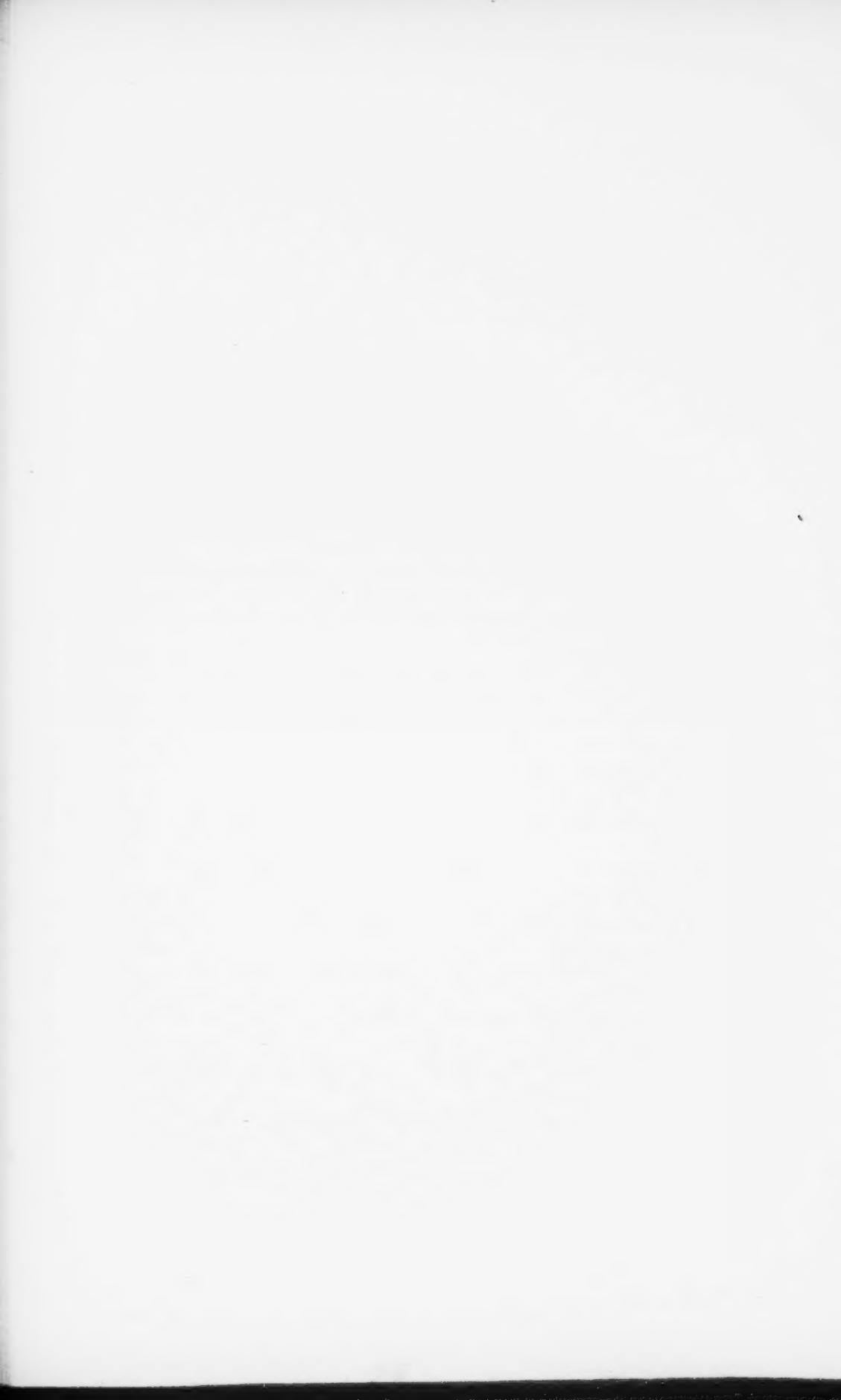


posed a hazard to patrons.

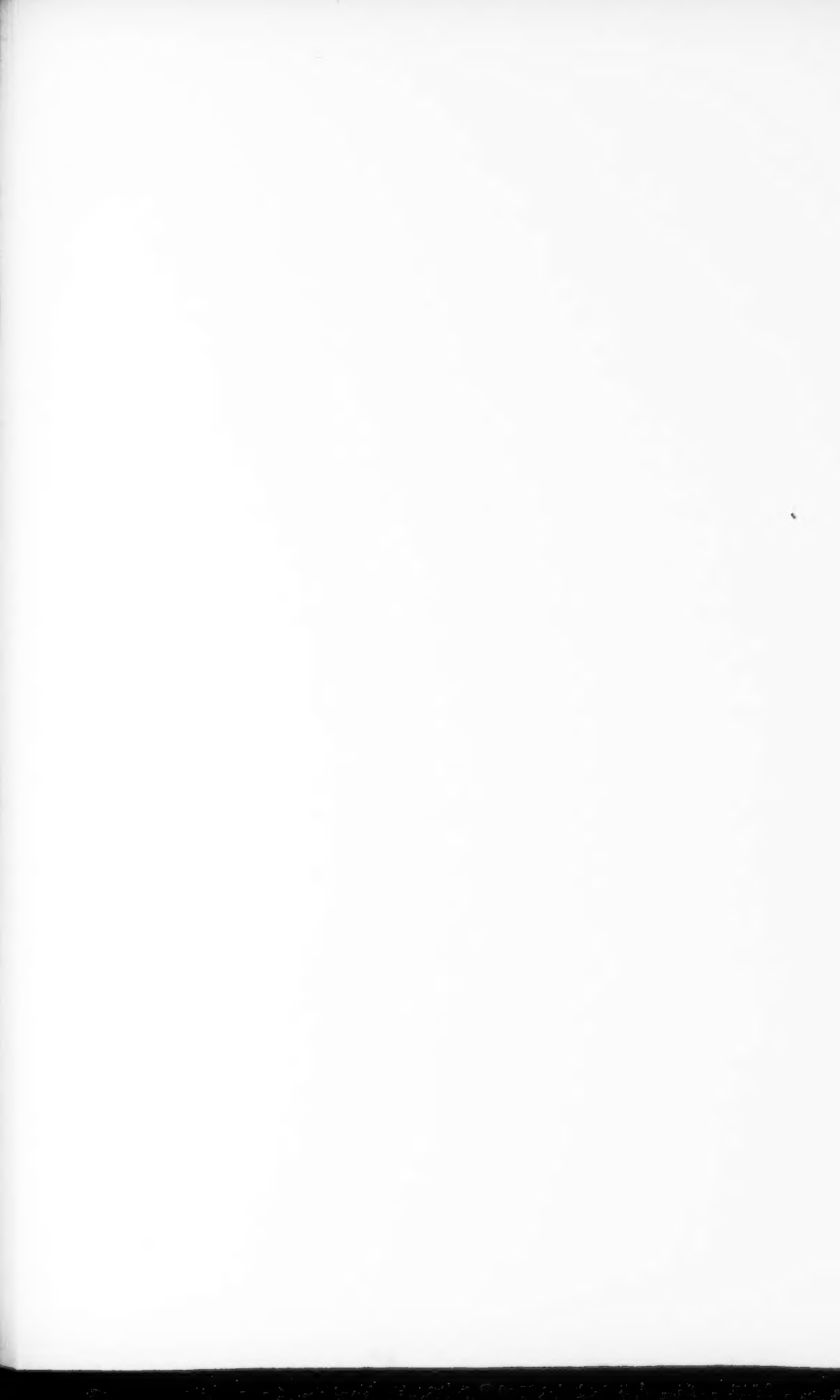
The defendants argue they are not liable because the table was open and obvious and did not constitute a dangerous condition.

II. SUMMARY JUDGMENT

It is axiomatic that a motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56, F.R.Civ.P. An issue of fact is "material" if it might affect the outcome of the case, and is "genuine" if the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202, 212 (1986);



Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538, 552 (1986). Of course, all inferences that can be drawn from the record must be viewed in the light most favorable to the non-moving party. Plaintiffs, however, have the burden of proof. If plaintiffs have not presented "sufficient" evidence to establish the existence of a claim, there can be no "genuine issue of material fact". A complete failure of proof concerning an essential element of plaintiffs' case renders all other facts immaterial. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, if after all reasonable doubts about the facts are resolved in plaintiffs' favor, and if reasonable minds might differ on the inferences arising from the facts, then summary judgment should be denied.



Washington v. Dugger, 860 F.2d 1018 (11th Cir. 1988) quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

Within their motion for summary judgment, the defendants have attacked plaintiffs' allegations with exhibits in an effort to demonstrate the falsity of plaintiffs' claim that they breached a duty of care. Should the evidence presented by the defendants be substantial and go uncontradicted but for plaintiffs' mere restatement of conclusory assertions, the granting of the summary judgment motion is justified due to the lack of disputing evidence. Perry v. Thompson, 786 F.2d 1093 (11th Cir. 1986); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980); Croley v. Matson Navigation Company, 434 F.2d 73 (5th Cir. 1970). Plaintiff "cannot rest on his pleadings



to present an issue of fact [but must] respond with affidavits, depositions, or otherwise, in order to reflect that there are material facts which must be presented to a jury for resolution". Coleman v. Smith, 828 F.2d 714 (11th Cir. 1987), quoting Van T. Junkins and Associates, Inc., v. U.S. Industries, Inc., 736 F.2d 656, 658 (11th Cir. 1984).

The exhibits offered in support of the defendants' motion for summary judgment include the deposition of plaintiff Deloris Adams, an affidavit of Craig Gillespie with an attached color photo of the table in question, and plaintiffs' answers to interrogatories. The exhibits offered in opposition to the motion by plaintiffs are the depositions of Evan Studer and Craig Gillespie.

The foregoing exhibits establish the following facts: Plaintiff, Deloris Adams, entered the lobby of the Holiday



Inn North mid-afternoon on March 30, 1986 and proceeded to walk from the front door to the main desk to obtain lodging. Before reaching the desk, plaintiff apparently tripped on or over the corner of a table. The floor of the lobby area of the Holiday Inn North was covered with beige tile. Part of the lobby (to the left of the front door upon entering) consisted of a seating area where the floor was covered with dark green carpeting. Upon the carpet set an L-shaped sectional sofa and a "low" two foot high table upon which was placed a potted plant approximately eighteen inches high. The table was constructed of clear glass or a "urethane type" top which sat upon a multi-colored fabric covered base. The table was placed on the carpet and was accessible from all four sides. The lobby area was well lit at the time by overhead lighting and



natural light from large windows. At the time of the accident, at least two other guests were in the lobby at the front desk checking into the hotel.

Apparently no witnesses actually saw plaintiff fall. Craig Gillespie, an employee of the hotel who was positioned behind the front desk, heard plaintiff fall and then saw her lying on the floor next to a table. Plaintiff herself remembers nothing prior to her impact with the floor - she doesn't know the layout of the lobby, doesn't recall the table, and essentially admits she does not know how she fell.

In response to the foregoing evidence, plaintiffs argue that "the lobby was congested with other patrons and the placement of the table close to the doorway...is sufficient to permit a jury to find the defendant negligent" and the "plaintiff has stated that it (the

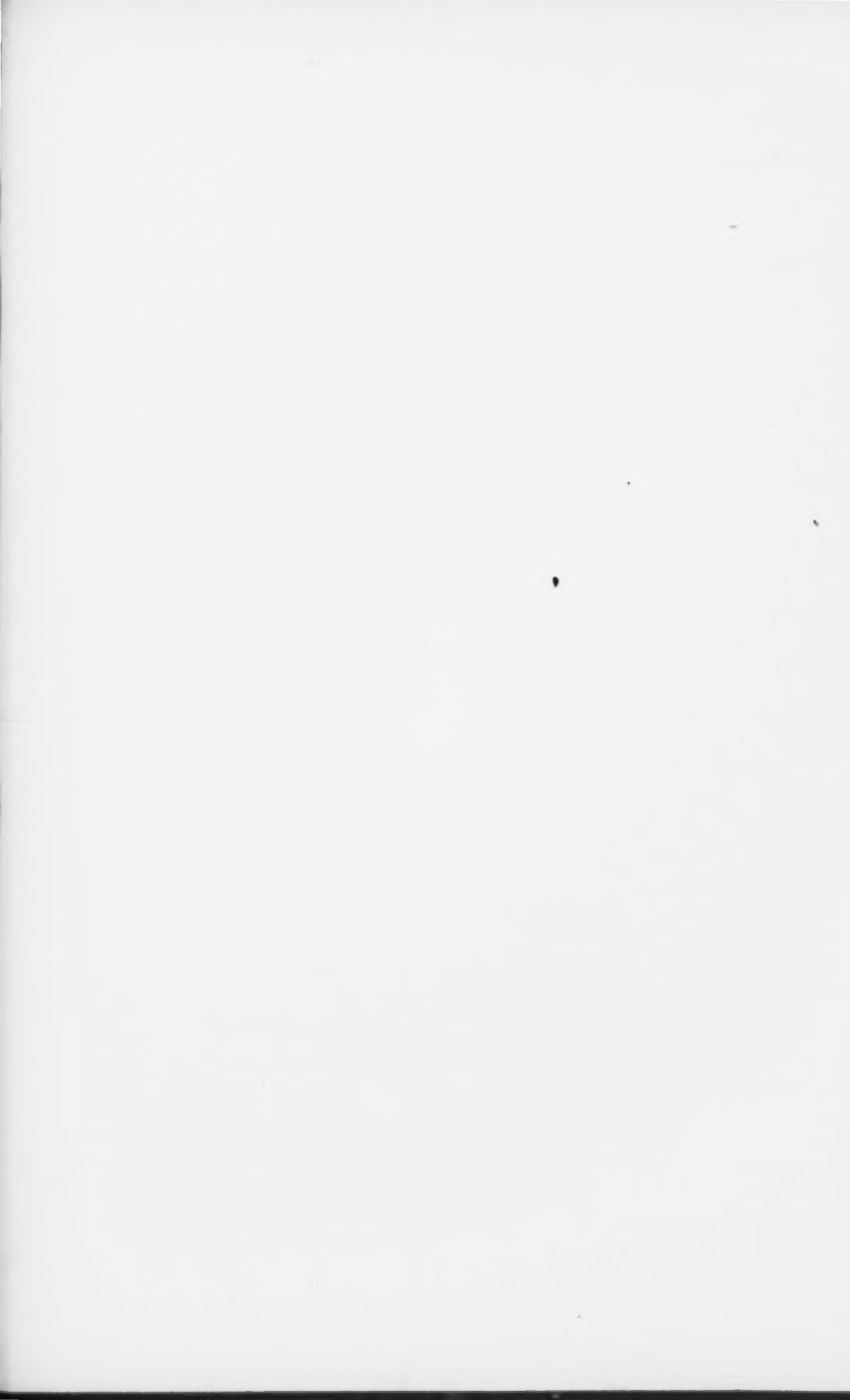
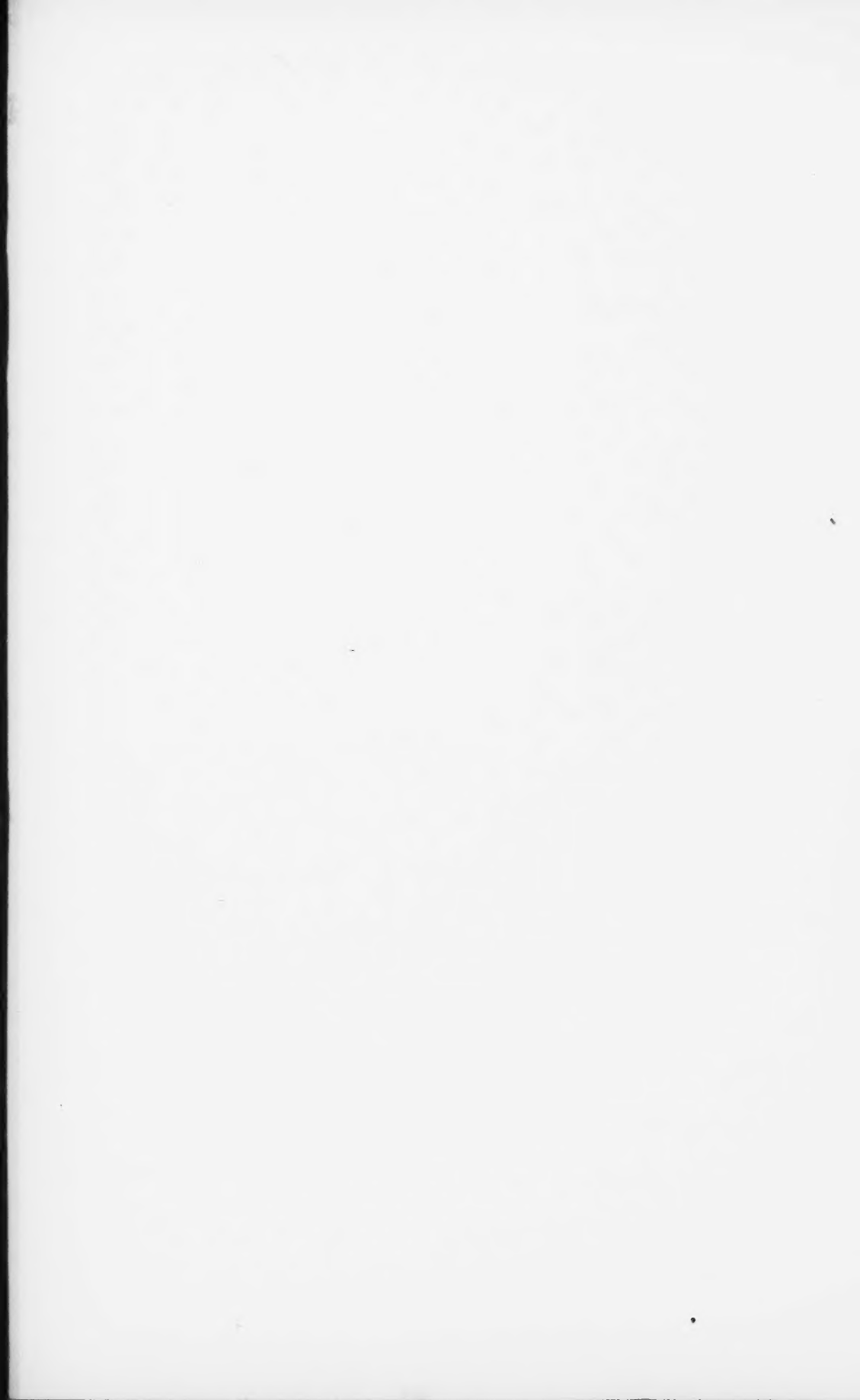


table) was not open and obvious to her,...[i]t was obstructed; it was obscured;...". The undersigned finds these arguments to be a "mere restatement of conclusory assertions" without supporting evidence. Perry v. Thompson, supra. After thoroughly reviewing all of the exhibits and evidence of record, the undersigned finds no facts to support an inference that the lobby was "congested" or that the table was in any way "obstructed" or "obscured" from view. Plaintiff merely says she does not recall seeing the table - or anything else for that matter - before she fell. [Plaintiff claims in an answer to an interrogatory that "the table was very low and stationed very near the entrance. There was nothing on the table to draw my attention to it and away from the distractions of a crowd allowed to remain near the entrance, . . .". Nevertheless,



she acknowledges in her deposition that this specific interrogatory response was based solely upon statements made by hotel employees that "the table had been moved, and they were in the process of moving it back again and had not done so". Such does not substantiate plaintiffs' argument of a "congested" lobby or that the table was "obstructed" or "obscured" from view.] While all reasonable inferences from the facts are to be resolved in plaintiffs' favor, the "mere occurrence of an accident does not give rise to an inference of negligence". Cassel v. Price, 396 So.2d 258 (Fla. 1st D.C.A. 1981).

It is clear from the evidence of record that the presence of the table, as part of an arrangement of furniture upon a distinctly carpeted area, was or should have been obvious to plaintiff when she entered the hotel lobby and approached



the front desk. The defendants are "entitled to expect, as a matter of law, that [plaintiff] would perceive that which would be obvious to her upon the ordinary use of her senses". Luby v. Carnival Cruise Lines, Inc., 633 F.Supp. 40 (S.D. Fla. 1986). Furthermore, it is common knowledge that a hotel lobby will contain furniture, including chairs and tables. The undersigned finds the placement of a table in a carpeted seating area of a hotel lobby even more obvious and commonplace than, for example, the existence of multiple floor levels (variations of several inches) within the interior of businesses and homes. Florida courts have repeatedly found the existence of multiple floor levels (unless of "uncommon design or mode of construction") does not constitute an inherently dangerous condition. Casby v. Flint, supra; Schoen



v. Gilbert, supra. See also, Prager v. Marks Bros. Co., supra. In like manner, this court does not find the table to be an inherently dangerous condition. Because the table and its placement in the hotel lobby on the day of plaintiff's fall was not an inherently dangerous condition, the defendants had no duty to warn as a matter of law. Schoen, supra.

Plaintiffs rely heavily upon a 1966 Fla. 2d D.C.A. case, Pourtless v. Suwannee Hotel Co., 184 So.2d 512, in opposition to the summary judgment motion. In Pourtless, the state appellate court found a hidden hazard in table legs that were recessed six inches from each corner of a table. In reviewing the initial complaint upon a lower court's grant of a motion to dismiss, the appellate court initially deemed as admitted all facts properly plead within the complaint. Certainly

upon a Rule 56 motion for summary judgment, especially when considered after an adequate time for discovery, the standard of review differs substantially when the defense challenges, with supporting contrary evidence, the existence of proof to support an essential element of plaintiffs' case. In the instant case, upon the defense evidence that the table was not obstructed or hidden, plaintiffs can no longer rely upon their pleadings to present an issue of fact. Since plaintiffs have not presented "sufficient" evidence to support the existence of a dangerous condition and of a claim, there is no "genuine issue of material fact" and summary judgment in favor of the defendants is appropriate. Celotex, supra.

III. MOTION TO COMPEL

The Eleventh Circuit has repeatedly

held that summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery. "Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests." Reflectone, Inc. v. Farrand Optical Co., Inc., 862 F.2d 841 (11th Cir. 1989); Snook v. Trust Company of Georgia Bank of Savannah, N.A., 859 F.2d 865 (11th Cir. 1988).

In this action, discovery was extended at the plaintiffs' request and expired on May 1, 1989, approximately seven months subsequent to the filing of the complaint. The parties were permitted to file Rule 56 materials in support or opposition of the motion for summary judgment through April 10, 1989. On April 6, 1989, Holiday Inn, Inc., (an unnamed defendant which is apparently the



named defendants' franchisor), formally objected to providing inspection or copying of certain documents requested by deposition subpoena (doc. 30). On June 22, 1989, approximately ten weeks after the objection was noticed, plaintiffs filed a motion to compel production of the following documents which were requested in a formal Request for Production:

1. All documents pertinent to the standard policies of the Holiday Inn, Inc. As to interior design, layout, floor plan, furniture placement and safety.

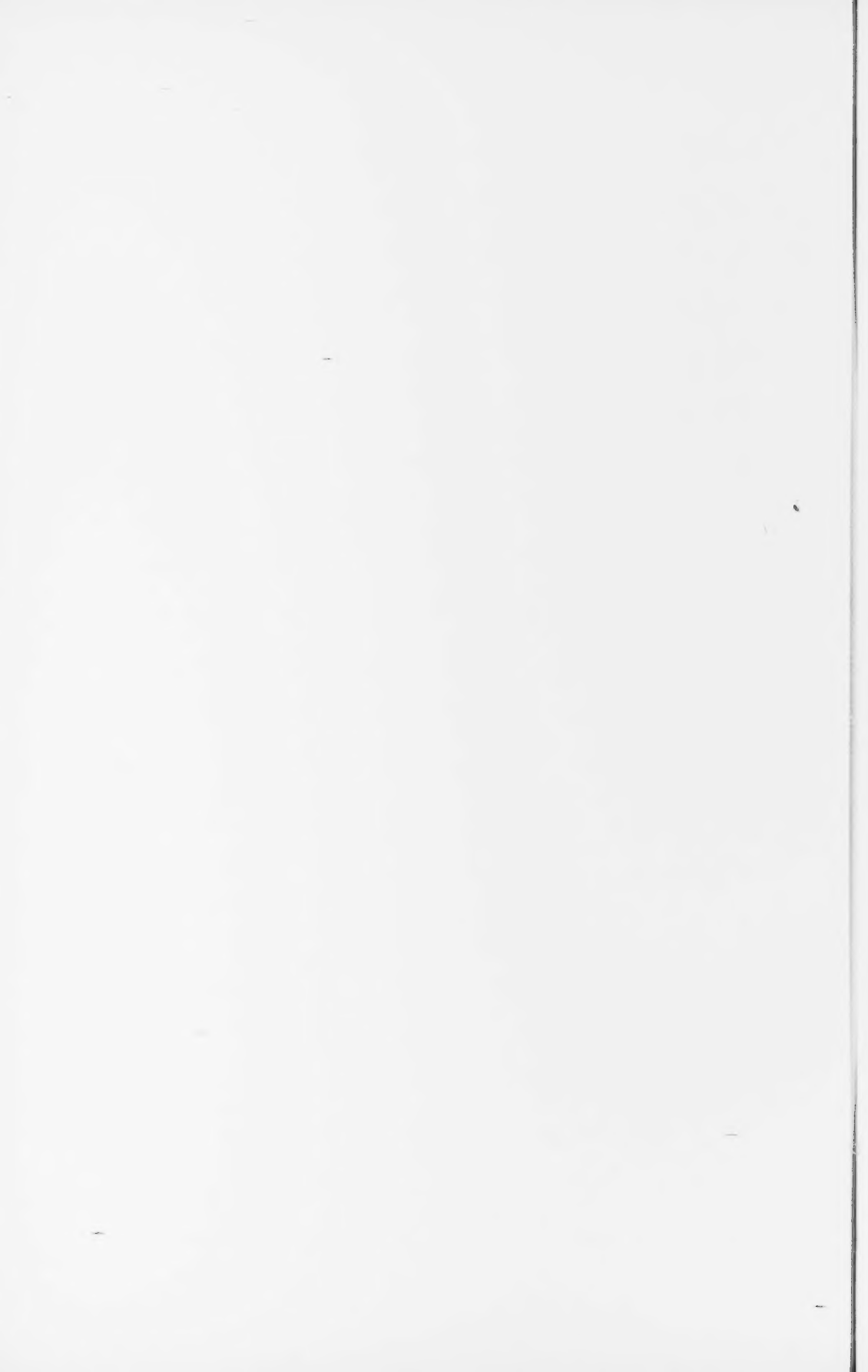
(doc. 37). Apparently Holiday Inn, Inc., objected to the production of the requested documents alleging that they are copyrighted materials which constitute trade secrets.

On June 29, 1989 the defendants submitted a response to the motion to compel (doc. 40). The defendants assert



that the plaintiffs' motion to compel is in violation of paragraph 5(f) of this court's scheduling order and advised the court that "Holiday Inn, Inc. would produce the documents requested, pertaining to some reasonable and identifiable time frame...if an order were entered by the court prohibiting the plaintiffs from disseminating this information through their attorney to the Association of Trial Lawyers of American or any other third party."

Plaintiffs have not raised an issue of inadequate discovery in terms of the pending summary judgment motion in either their motion to compel or their response to the motion for summary judgment. no allegation has been made by plaintiffs that the requested documents that Holiday Inn, Inc. refuses to produce constitutes evidence essential to their opposition to the summary judgment motion. Indeed,



based upon the complete absence of evidence by the plaintiffs that the table or its placement constituted a hazard, the undersigned finds the requested documents regarding standard policies of the corporation would not assist plaintiffs in defeating the motion for summary judgment.

Both due to its untimeliness and since the ruling contained herein granting summary judgment in favor of the defendants moots the discovery dispute, the motion to compel shall be denied.

CONCLUSION

The court determines that there are no material issues of fact and the defendants are entitled to judgment as a matter of law. Accordingly, it is ORDERED:

1. Defendants' motion for summary judgment is GRANTED and plaintiffs' case is dismissed without prejudice. Judgment



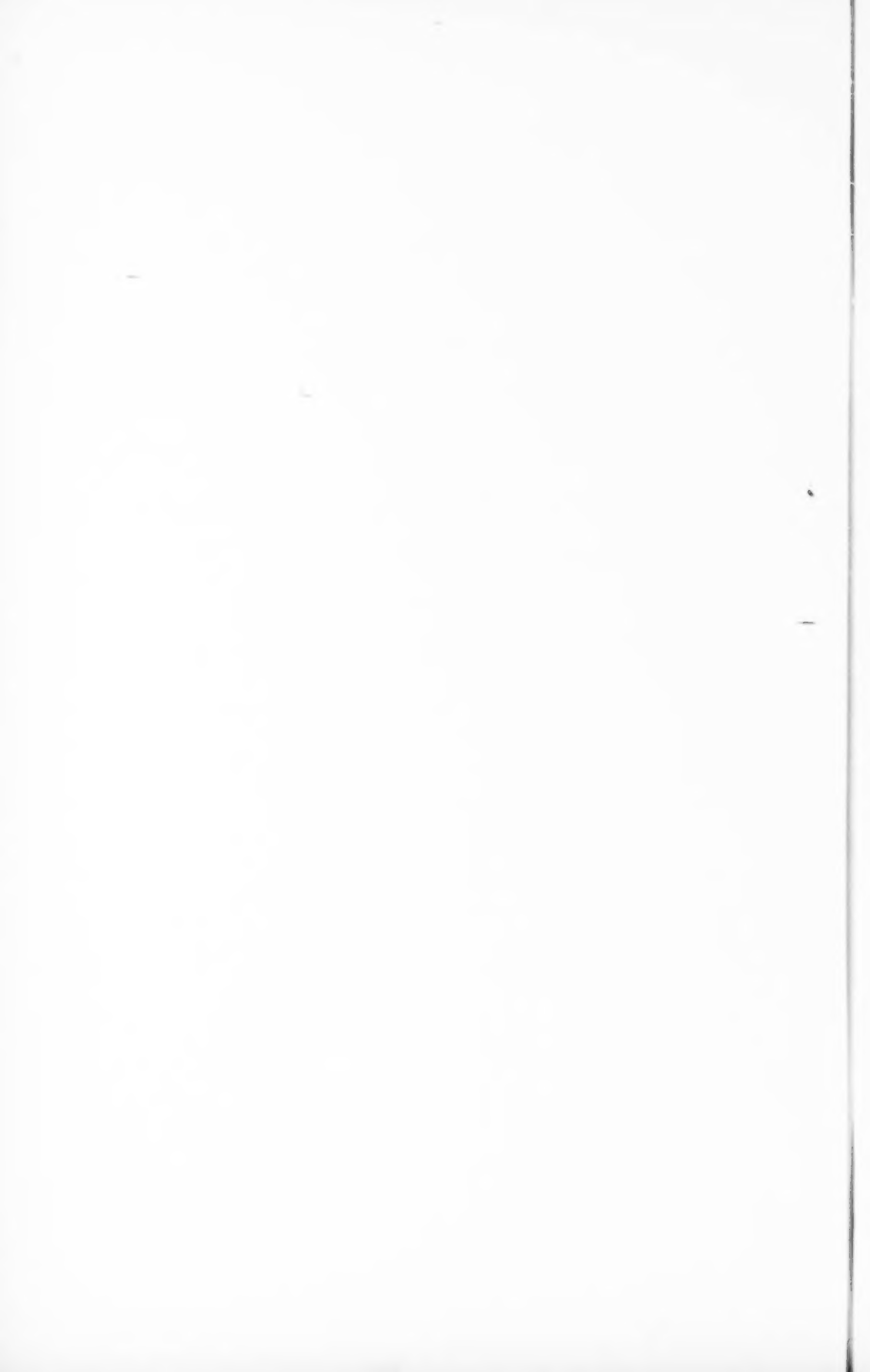
shall be entered in favor of defendants and against plaintiffs.

2. The plaintiffs' motion to compel is DENIED.

3. The court reserves jurisdiction to assess costs, if any, upon appropriate motion of the parties.

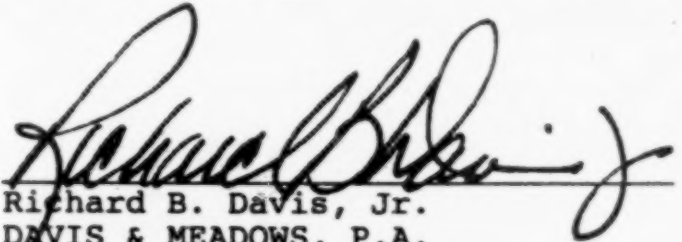
DONE AND ORDERED this 1st
day of September, 1989.

/s/ Susan M. Novotny
SUSAN M. NOVOTNY
United States Magistrate



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari have been served upon the Respondents herein, in compliance with Rule 28.3., Rules of the Supreme Court of the United States, by depositing said copies in a United States mailbox, with first-class postage prepaid, addressed to Millard L. Fretland, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, P.A., Post Office Box 13010, Pensacola, FL 32591-3010, this 3d day of August, 1990.



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Gainesville, Fl 32601
(904) 376-1100



SUPREME COURT
OF THE UNITED STATES OF AMERICA

CASE NO.: _____

DELORIS M. ADAMS and
GRADY C. ADAMS,

Petitioners,

vs.

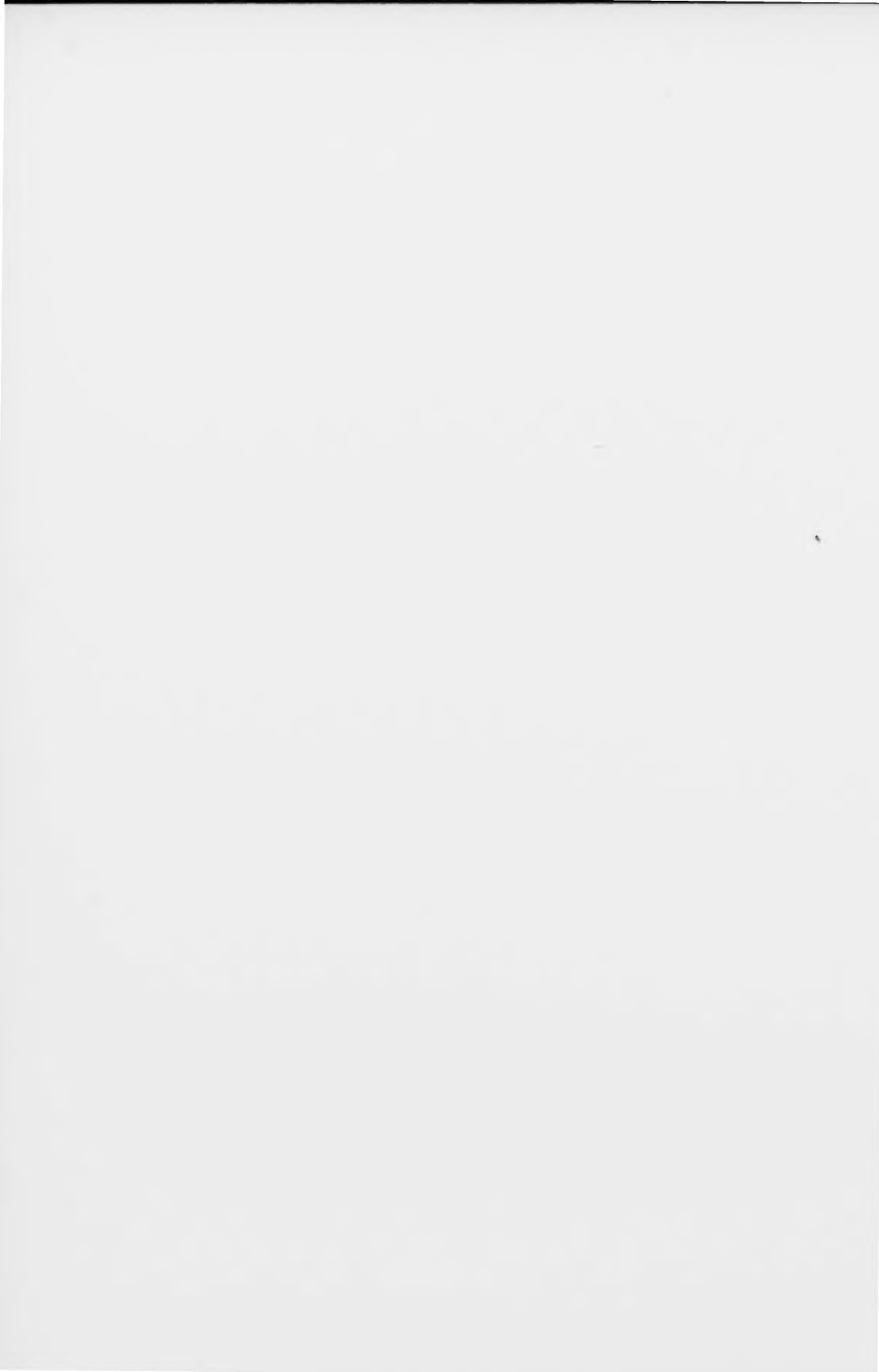
LEISURE DYNAMICS, INC., and
VISTA HOST, INC., a joint venture
d/b/a HOLIDAY INN NORTH,

Respondents.

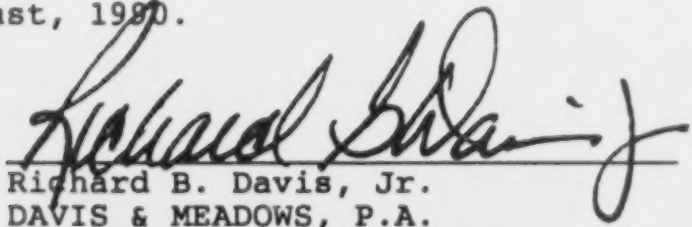
APPEARANCE OF COUNSEL

The undersigned, RICHARD B. DAVIS, JR., of the Law Firm of Davis & Meadows, P.A., hereby files his notice of appearance as counsel of record for Petitioners, Deloris M. Adams and Grady C. Adams, in their Petition for Writ of Certiorari filed simultaneous herewith.

I HEREBY CERTIFY that three (3) copies of the foregoing Appearance of



Counsel have been served upon the Respondents herein, in compliance with Rule 28.3., Rules of the Supreme Court of the United States, by depositing said copies in a United States mailbox, with first-class postage prepaid, addressed to Millard L. Fretland, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, P.A., Post Office Box 13010, Pensacola, FL 32591-3010, this 30 day of August, 1980.



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(904) 376-1100